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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY



December 31, 2002

EX PARTE OR LATE FILED

Ms. Marlene Dortch
Federal Communications Commission
445 12th Street, S.W.. TW-A325
Washington. D.C. 20554

Re: **EX PARTE**

ET Docket No. 95-18; IB Docket 01-185
SAT-MOD-20020719-00103; SAT-MOD-20020719-00105; SAT-T/C
-20020718-00114. SAT-T/C-20020719-00104

Dear Ms. Dortch:

On December 19, 2002, Mobile Communications Holdings, Inc. (MCHI), Constellation Communications Holdings, Inc. (CCHI), and ICO Global Communications Holdings, Ltd. (ICO) met with the Office of General Counsel, including Deputy General Counsel Michelle Ellison, Dan Harrold, Neil Dellar, James Bird and Karen Onyeije, to discuss Commission precedent on satellite infrastructure sharing arrangements and milestone compliance. Suzanne Hutchings and ICO Counsel Cheryl Tritt attended on behalf of ICO, MCHI counsel Tom Davidson attended on behalf of MCHI, and CCHI counsel Robert Mazer attended on behalf of CCHI.

In response to questions from OGC regarding any possible contingencies in the Sharing Agreements executed between ICO and MCHI and between ICO and CCHI, MCHI and CCHI noted that neither ICO's obligation to construct and deliver the system, nor MCHI's or CCHI's obligation to purchase system capacity, is contingent. Each Sharing Agreement expressly requires ICO to deliver system channel capacity in accordance with the milestones imposed by the FCC. CCHI and MCHI pointed out that this obligation has been binding on ICO since the parties executed the Sharing Agreements, and that ICO continues to be obligated to perform today. They stated that the current and ongoing performance obligations of each of the three parties under the Sharing Agreements are unqualified and unconditional.

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CCHI and MCHI emphasized that at the time of completion of the satellite system, ICO is obligated to transfer title to system channel capacity, and MCHI and CCHI each must make final payments under the contract. CCHI and MCHI stated that this requirement mirrors how transfer of title is delivered in-orbit, from a satellite manufacturer to a satellite operator, following launch of a satellite system. Although certain administrative actions must be performed prior to title transfer, but they are not conditions precedent to any party's commitment to fulfill its obligations under the Sharing Agreements. Specifically, these actions include the execution of an Operation and Management Agreement that conforms to the terms specified in the Sharing Agreement, and to deliver a bill of sale and officers' certificates. The parties noted that each is contractually obligated to take these actions by the Sharing Agreements. Failure to do so would result in a breach of the Sharing Agreements and would enable the non-breaching party to initiate appropriate legal action to enforce the obligations.

The situation here is dramatically different from *Norris Satellite Communications, Inc.*, 12 FCC Rcd 22299 (1997). There, the satellite manufacturer's obligation to commence construction was not binding until a specific payment was made by the licensee. The licensee failed to make the required payment. Thus, the licensee failed to fulfill a condition of its contract; and as a result, the satellite manufacturer was not obligated to commence construction of the licensee's satellite system. In the instant Sharing Agreements, however, the obligations imposed upon all of the parties are unqualified and unconditional, and the contract is binding and effective. ICO is obligated to provide system channel capacity, and CCHI and MCHI are obligated to pay for that capacity as specified in the Sharing Agreements.

The parties otherwise relied upon the attached matrices in discussing other issues.

In accordance with section 1.1206(b) of the Commission's rules, we are submitting an electronic copy of this letter. If you have any questions concerning this matter, please do not hesitate to contact us.

December 31, 2002

Very truly yours:

/s/ Tom W. Davidson

Tom **W.** Davidson

Akin Gump Strauss Hauer & Feld, LLP

/s/ Robert **A.** Mazer

Robert A. Mazer

Vinson & Elkins, LLP

/s/ Cheryl A. Tritt

Cheryl **A.** Tritt

Morrison & Forester, LLP

Attachments

cc: Michelle Ellison
Daniel *Harrold*
James Bird
Neil Dellar
Karen Onyeije

FCC SATELLITE SHARING CASES APPROVING MILESTONE COMPLIANCE

Case	FCC Findings
<p><i>Applications of United States Satellite Broadcasting Co. Inc.</i>, 7 FCC Rcd 7247 (MMB 1992)</p>	<p>First due diligence milestone required USSB “to complete contracting for construction of the satellite station(s) within one year of the grant of the construction permit.”</p> <p>FCC interpreted first due diligence milestone to require contract that “contains no unresolved contingencies which could preclude substantial construction of the satellites.”</p> <p>FCC found that USSB-Hughes sharing agreement “complies with the first component of the due diligence requirement.”</p> <p>FCC found that payment schedule contained in sharing agreement and USSB’s compliance with payment schedule were “sufficient to determine that [USSB] is making a financial commitment to the construction of the satellite.”</p> <p>FCC found that sharing agreement complied with first milestone, even though contract called for implementation of a modified system requiring FCC approval.</p>
<p><i>Application of Volunteers in Technical Assistance</i>, 12 FCC Rcd 3094 (IB 1997) (“VITA II”)</p>	<p>FCC established milestones requiring VITA to complete construction and launch of satellite by specific dates.</p> <p>FCC rejected opponent’s argument that sharing arrangement did not satisfy “either the letter or the spirit of the construction and launch milestones.”</p> <p>FCC rejected opponent’s argument that VITA-Final Analysis sharing agreement contained open contingencies in violation of milestones.</p> <p>FCC viewed VITA-Final Analysis sharing agreement as just like other “construction and launch services agreements [that] have contingencies that may result in the termination of the agreement.”</p>
<p><i>Application of Volunteers in Technical Assistance</i>, 12 FCC Rcd 13995 (1997) (“VITA I”)</p>	<p>FCC established milestones requiring VITA to complete construction and launch of satellite by specific dates.</p> <p>By approving VITA-CTA sharing arrangement, FCC recognized that timely implementation of sharing arrangement would satisfy construction and launch milestones.</p>

FCC CASES REJECTING MILESTONE COMPLIANCE ARE DISTINGUISHABLE

Case	Facts & Findings	Distinguishable Facts of CCHI/MCHI/ICO Sharing
<i>Advanced Communications Corp.</i> , 11 FCC Rcd 3399 (1995)	<p>FCC denied ACC's second request for milestone extension to construct DBS system, finding that ACC had over 10 years, including a 4-year extension, to construct DBS system and did not warrant a second extension.</p> <p>FCC proposed to assign DBS authorization to Tempo DBS or, alternatively, implement capacity purchase agreement ("CPA") with TCI. FCC declined to treat CPA as an arrangement for launch of ACC's DBS system because: (1) CPA required ACC to sell all rights to transponder capacity; (2) CPA did not require ACC to make any payments for satellite construction or permit ACC to acquire ownership in satellite; and (3) ACC contracted away control of its licensed frequencies and agreed to dissolve upon sale of capacity.</p> <p>FCC distinguished prior approval of USSB-Hughes sharing arrangement by noting that USSB owned part of shared satellite and operated system independently of Hughes.</p>	<p>CCHI & MCHI are not seeking [milestone extension in the first instance. CCHI & MCHI do not require milestone extension because sharing agreements satisfy first milestone.</p> <p>Under sharing agreements, CCHI & MCHI (1) retain rights to sell transponder capacity; (2) are required to make payments in exchange for ownership in satellite capacity; and (3) retain control of their licensed frequencies and will operate systems independently of ICO.</p> <p>Like USSB, CCHI & MCHI will acquire ownership interest in satellite capacity and will maintain independent operations under the sharing agreements.</p>
<i>Dominion Video Satellite, Inc.</i> , 14 FCC Rcd 8182 (IB 1999)	FCC found that Dominion Video's <i>leasing</i> of satellite capacity on Echostar's satellite did not satisfy the due diligence milestones.	CCHI & MCHI are not leasing, but rather purchasing ownership interests in capacity on the ICO system
<i>Columbia Communications Corp.</i> , 16 FCC Rcd 10867 (IB 2001) (" <i>Columbia Reconsideration Order</i> ")	FCC declined to allow Columbia's sharing arrangement to satisfy C-band FSS milestones because the shared satellite was not subject to and did not comply with full frequency reuse requirements applicable to Columbia's licensed C-band FSS system	CCHI & MCHI are purchasing capacity on an authorized 2 GHz MSS system that is subject to the same service and technical requirements applicable to CCHI's & MCHI's licensed systems.

<p><i>GTE Spacenet Corp.</i>, 2 FCC Red 5312 (CCB 1987)</p>	<p>FCC declined to allow Geostar's sharing arrangement to satisfy RDSS milestones because the shared satellite was licensed under and subject to FSS service and technical rules that were completely different from those governing Geostar's licensed RDSS satellite.</p>	<p>CCHI & MCHI are purchasing capacity on an authorized 2 G/Iz MSS system that is subject to the same service and technical requirements applicable to CCHI's & MCHI's licensed systems.</p>
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FCC APPROVAL OF SATELLITE SHARING ARRANGEMENTS

Case	FCC Action
<i>Applications of United States Satellite Broadcasting Co. Inc., 7 FCC Rcd 7247 (MMB 1992)</i>	Granted modification application to permit USSB to implement DBS system by purchasing capacity on satellite licensed to IJSSB.
<i>Application of Volunteers in Technical Assistance, 12 FCC Rcd 13995 (I 997) ("VITA P")</i>	Affirmed Int'l Bureau's grant of authorization to VITA to construct and operate Little LEO system under sharing arrangement with CTA. CTA would construct, own, and operate satellite and use 50% of satellite capacity, while VITA would retain control of licensed frequencies and satellite capacity.
<i>Application of Volunteers in Technical Assistance, 12 FCC Rcd 3094 (IB 1997) ("VITA IP")</i>	Authorized VITA to construct and operate Little LEO system under sharing arrangement with Final Analysis, an experimental radio licensee. Final Analysis would construct own and operate satellite and use 50% of satellite capacity, while VITA would own and control satellite transponders operating on its licensed frequencies.
<i>Application of AMSC Subsidiary Corp., 13 FCC Rcd 12316 (IB 1998)</i>	Granted modification application to permit AMSC to acquire 50% ownership interest in TMI's Canadian-licensed satellite and shift its L-band MSS operations to that satellite. AMSC and TMI each would operate independently of each other and according to the terms of its respective license.
<i>Columbia Communications Corp., 7 FCC Rcd 122 (I 991) ("Columbia Authorization Order")</i>	Authorized Columbia to provide FSS by purchasing capacity on two satellites owned and operated by NASA.
<i>Columbia Communications Corp., 16 FCC Rcd 10867 (IB 2001) ("Columbia Reconsideration Order")</i>	Authorized Columbia to provide FSS by purchasing capacity on a satellite owned and operated by NASA.
<i>GTE Spacenet Corp., 2 FCC Rcd 5312 (CCB 1987)</i>	Granted a license to Gcostar to operate a radiodetermination satellite service payload on a satellite licensed to GTE Spacenet.
<i>Dominion Video Satellite Inc., 14 FCC Rcd 8182 (IB 1999)</i>	Authorized Dominion Video to operate DBS system by leasing capacity on a satellite licensed to Echostar.

FCC CASES FINDING FAILURE TO MEET NON-CONTINGENT CONTRACT MILESTONE

In all cases involving a satellite licensee's failure to meet a non-contingent construction contract milestone, the FCC found that 1) the licensee had not executed any contract by the milestone deadline; 2) the contract did not contain binding commitments by either manufacturer or licensee to proceed with construction; or 3) the contract contained conditions precedent that prevented commencement of construction. In cases where a contract contained binding commitments by both parties to proceed with construction, the FCC has never scrutinized the sufficiency of those commitments by examining whether the contract provides for a specified amount or number of payments by the licensee or requires specific remedies for contract termination.

Case	Facts & Findings
<i>Constellation Communications Holdings, Inc.</i> , DA 02-3086 (IB rel. Nov. 8, 2002), <i>petition for recon. pending</i> .	FCC denied modification application and milestone extension request, and cancelled Big LEO license. CCHI did not certify compliance with milestone requiring non-contingent contract for remaining satellites of its system.
<i>Motorola, Inc. and Teledesic, LLC</i> , 17 FCC Rcd 16543 (IB 2002).	FCC denied milestone extension request and cancelled Ka-band FSS license. Motorola did not execute any contract for construction of first satellite.
<i>Mobile Communications Holdings, Inc.</i> , 17 FCC Rcd 11898 (IB 2002), <i>application for review pending</i> .	FCC affirmed on reconsideration its cancellation of Big LEO license for failure to meet a milestone. MCHI had a contract for construction of first two satellites, but no contract requiring construction of remaining satellite! Existing contract stated the parties were to negotiate another contract for construction of remaining satellites at later time, and contained no provision requiring manufacturer to undertake physical construction of remaining satellites.
<i>Astrolink International LLC</i> , 17 FCC Rcd 11267 (IB 2002).	FCC found that Astrolink had not met construction commencement milestone because it had no construction contract in effect at time of milestone deadline. FCC waived milestone because construction of spacecraft was 90% complete.

<p><i>EchoStar Satellite Corp.</i>, 17 FCC Rcd 12780 (IB 2002), reversed on reconsideration, DA 02-3085 (IB rel. Nov. 18, 2002).</p>	<p>FCC canceled EchoStar's Ka-band FSS license for failure to meet construction commencement milestone.</p> <p>FCC found that construction contract "does not commit the manufacturer to construct a Ka-band subsystem or to guarantee its operation even if constructed." FCC also found that Ka-band system "would be able to operate only under certain limited conditions that may never occur."</p> <p>In a subsequent Nov. 2002 order, FCC reversed cancellation and reinstated license following submission of additional evidence that Ka-band system is under construction and will be operational.</p>
<p><i>Morning Star Satellite Co., LLC</i>, 16 FCC Rcd 11550 (2001).</p>	<p>FCC affirmed IB's cancellation of Ka-band FSS license for failure to meet commencement of construction milestone.</p> <p>Construction contract "contained no terms relating to the contractor's construction schedule, no terms regarding Morning Star's payment schedule, and no terms that indicated a binding commitment for satellite construction."</p> <p>Construction contract was executed after milestone deadline.</p>
<p><i>PanAmSat Licensee Corp.</i>, 16 FCC Rcd 11534 (2001).</p>	<p>FCC affirmed IB's denial of milestone extension request and cancellation of Ka-band FSS license.</p> <p>PanAmSat did not execute any construction contract.</p>
<p><i>NetSat 28 Co. LLC</i>, 16 FCC Rcd 11025 (IB 2001).</p>	<p>NetSat 28 failed to meet construction commencement milestone because it executed construction contract 18 months after milestone deadline.</p> <p>FCC waived milestone and reinstated Ka-band FSS license because NetSat 28's difficulties resulted from prior FCC action.</p>
<p><i>Norris Satellite Communications, Inc.</i>, 12 FCC Rcd 22299 (1997).</p>	<p>FCC affirmed IB's denial of milestone extension request and cancellation of Ka-band FSS license for failure to meet construction commencement milestone.</p> <p>FCC found that contract was contingent because "construction could not begin until a large down payment was made to the satellite manufacturer." Licensee failed to make payment that would have triggered manufacturer's obligation to commence construction.</p>

TEMPO Enterprises, Inc., 1
FCC Rcd 20 (1986).

Applications of CBS, Inc.,
99 FCC 2d 565 (1984).

FCC⁴ denied milestone extension request and cancelled
National Exchange Satellite, Inc.'s DBS construction permit.

National Exchange Satellite did not execute any construction
contract.

FCC found that "payment and construction schedules appear
to depend on payment of a specified cash sum and
presentation of letters of credit."

Because of special circumstances, FCC declined to cancel
DBS permit for failure to meet due diligence milestone, but
required Direct Broadcast Satellite Corp. to eliminate
contingency by specified date.